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FILED
FEB 27 1958
JOHN T. FEY, Clerk

No. 730.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

HOUSTON BELT & TERMINAL RAILWAY COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, FORT WORTH AND DENVER RAILWAY COMPANY, GULF, COLORADO & SANTA FE RAILWAY COMPANY,
Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and TEXAS AND NEW ORLEANS RAILROAD COMPANY.

On Appeal from the United States District Court for the Southern District of Texas, Houston Division.

APPELLANTS' BRIEF OPPOSING THE MOTIONS TO AFFIRM.

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The Motions.

Two motions to affirm have been filed, one by appellee Texas and New Orleans (T&NO) and one jointly by the United States and the Commission, referred to collectively herein as the Government. This brief deals with both motions.

Argument.

I. *The Baltimore Case Is Inapplicable.*

1. It is notable that movants do not, in any particular, dispute appellants' statement of how the order condemned in the Baltimore case[1] would have operated, or of the entirely different manner in which the order sought here would operate. At this point then it stands admitted: (a) that the *Baltimore* order would have decreased the divisions of the appellants there, by taking revenue from their divisions and adding it to the divisions of appellees; (b) the order sought here would not affect as such the divisions of T&NO, which would remain exactly the same whether or not that order was entered. With agreement reached on those matters we can come to grips with the critical question on this appeal: whether for the purposes of Section 15 (6) of the Act the order sought here would stand on the same footing as the one condemned there.[2]

Appellants believe that for the purposes of that section there is a valid and wide distinction between an order which does not affect operations but changes divisions by taking money from one carrier and giving it to another; and an order which leaves divisions unchanged and merely affects operations. The Government argues that this "misconceives the rationale of *Baltimore & Ohio*" (Motion, 6); and it is necessary to examine that contention in some detail.

It was a basic premise of the reasoning in that case that no change in the handling of the traffic was involved. This was emphasized quite early in the opinion, in the

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[1] *Baltimore & O. R. Co. v. United States*, 277 U. S. 291 (1928).

[2] All section references are, of course, to the Interstate Commerce Act, 49 U. S. C., Section 1 *et seq.*

description of the assailed order (277 U. S. 295), and it permeated all that followed. It happened that in an earlier phase of the same controversy the court had set aside a district court judgment directing the east-side lines to pay those on the west certain accrued river-crossing charges, *Terminal Railroad Asso. v. United States,* 266 U. S. 17 (1924); and after referring to that action the court observed that, except for relating to the future rather than to the past, the order before it required exactly the same thing—i. e., the payment of money. It was in this context that the court said, as appellees like to remind us, that in both proceedings the controversial matters were "purely financial." But after using that somewhat infelicitous phrasing the court immediately added by way of explanation, and mentioning the matter for the second time: "There was no question concerning * the handling of traffic" (277 U. S. 298).

The court then turned to whether the thing complained of was a "practice", and observed that the application of that quite general term had to be confined to things "of the same general class as those associated with it" in the context. In the context at hand, those things were reasonable rules and regulations respecting the use, control, movement, interchange and the like of cars, locomotives and other vehicles used in transportation. Obviously, "practice" in such a context would not include the method or basis used by connecting carriers for their divisions of revenues, and the court so held (277 U. S. 360). After which, and finally, it held that since the order changed divisions it was invalid, whether or not a "practice", because of the absence of evidence required by Section 15 (6).

It is submitted that the entire opinion hinged on the absence of any change in operations, either sought or ordered. And that view is confirmed if we examine the record in that case in this Court, which is noticeable, we

take it, by the Court now.[1] A fundamental allegation in the complaint (para. XIII) was that if the order was permitted to take effect the traffic involved would be handled exactly as it had been; that the order went solely to the apportionment of revenue, and that its only effect would be to reduce the plaintiff's shares or divisions of the through rates. That was at the heart of the appellants' entire theory of the case.

That record is also instructive as to the nature of the river-crossing charges—a matter relevant to the contention that the order here would have precisely the same effect as that in *Baltimore*. Here we deal with the cost of a switching service which is of course uniform: manifestly the cost of switching 100 pounds of freight between two points is the same regardless of what the freight is. But the record in *Baltimore* shows the transfer charges there ranged from 1½¢ per 100 pounds on low-grade commodities to 5¢ on commodities taking first-class rates. Thus the river-crossing charges, although not stated as divisions, were such in fact;[2] and by tampering with them the Commission necessarily affected the other divisions. The effect of the order, as the Court said, was to "change the tariffs" of the appellee lines (277 U. S. 299).

2. The essential logic of appellee's contention is that if an interchange order puts a carrier to *any* additional uncompensated expense it is invalid. In that view a railroad might not be required to perform one mile, one-half mile, one city block, of additional service—because that would

[1] *National Fire Insurance Co. v. Thompson*, 281 U. S. 331 (1930); *West Ohio Gas Co. v. Public Utilities Com.*, 291 U. S. 63 (1934); *Baltimore* was No. 404 at the October Term, 1927.

[2] Divisions out of one rate "may well be higher or lower than those out of another, depending on the measure of the rates to be divided." Bellefonte Central R. Co. v. Pennsylvania R. Co., 216 I. C. C. 39, 66. The measure of the rates, of course, depends on the character and grade of the commodity.

change its divisions. But if this is true the car service provisions are largely meaningless; and the protracted effort of Congress to establish adequate car service practices becomes an exercise in futility.[1]

That theory would, moreover, affect matters other than interchange: extensions of carrier service are required by the Act for other purposes and at the instance of shippers as well as other carriers. In *Trojan Scrap Iron Corporation v. Boston & M. R.*, 270 I. C. C. 727 (1948), to illustrate, the Commission under Section 1 (4) and (9) required the railroad to extend its switching service to complainants' industries. No provision was made for additional compensation for the extra service. It is a necessary assumption that at least some of the traffic was handled on joint rates; and on the theory urged here the carrier's divisions were affected and the order was invalid. Section 1 (9), authorizing the Commission to require extensions of switching service for the benefit of shippers, is a rather important provision. So is Section 1 (21), under which carriers may be required to provide adequate facilities for performing car service and to extend their lines for that purpose. The Commission's stated powers under those sections would be gravely impugned, if not extinguished, by the ruling appealed here.

3. The Government argues (Motion, 8) that the purpose of car service provisions was a narrow one, and was not to confer "omnibus" power over car interchange. But if we substitute the equivalent but less invidious term "plenary," the purpose of those provisions was exactly that. It was so stated in Congress and has been so declared by the

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[1] The car service provisions were first inserted in the Act in 1910, and were amended in 1917 and again in 1920. In each instance the expressed intent of Congress was to enlarge and strengthen them; to make them "plenary." See House Rep. 18, 65th Cong., First Sess., Vol. 1; 7252 (1917), 58th Cong. Rec. 8315 (1920).

courts (Jur. St., 9). The purpose of Section 15 (6) was on the other hand entirely different. A part of the Transportation Act of 1920, that section was directed to the overall financial strengthening of the nation's railroads and was wholly unrelated to matters of operation and service.

It is not true, as appellees imply, that it is only the expense of transferring the cars which aggrieves appellants. The President of appellant Belt testified that its crews and power could be much better utilized than they are in handling T&NO's cars for it; that loss of control of Belt's engines while in Englewood Yard is objectionable; and that T&NO's use of its own line for transfers to Settegast Yard would permit much better use of Belt's East Line, which is now used for that transfer but which handles a great volume of other traffic (Comm. tr. 352-4). These matters were duly brought to the attention of the Commission and the lower court. They were not emphasized because they could not in candor be called major causes for complaint; but they sufficiently illustrate that in no view is this a case involving purely financial considerations. It can be more accurately characterized as an "operational dispute", like *Seaboard Air Line Railroad Co. v. United States*, 131 F. S. 129 (judg. aff'd 349 U. S. 902), upon which we presently touch. Despite their early (and it turns out, unfortunate) suggestion as to other methods of settling the controversy, what appellants sought before the Commission, and still seek, is performance by T&NO of its share of the interchange service.

II. *Untenability of Other Grounds Urged.*

1. Possibly uncertain of its ground under *Baltimore*, the Government defends the dismissal below on the alternative ground given by the Commission, and in that connection says (Motion 8): "Section 3 (4) requires a carrier to afford adequate and equal facilities for traffic interchanged between it and connecting lines *. There is no evidence

that the interchange facilities are inadequate *." This makes consideration of *Seaboard Air Line Railroad Co. v. United States*, just cited, pertinent.

In that case the Coast Line sought the establishment by the Commission of a new interchange point, in view of the proposed imminent abandonment of the existing one. The defendant, among other things, contended that the interchange sought would deprive it of its long haul, contrary to its rights under Section 15 (4) of the Act. Division 3 of the Commission, sustaining the complaint, thought it unnecessary to pass on that defense, and declared that the "positive mandate of section 3 (4), to the effect that carriers shall afford reasonable and proper facilities for the interchange of traffic *" warranted the granting of the relief sought. *Atlantic Coast Line R. Co. v. Seaboard Air Line R. Co.*, 286 I. C. C. 669, 675 (1952), 291 I. C. C. 329 (1954). Seaboard took the matter to court, but its complaint was dismissed in a careful opinion which characterized the controversy as an "operational dispute", and held the Commission had acted within its authority. On appeal the Commission, as well as the United States and Coast Line, moved to dismiss for want of a substantial question, and the motions were granted (349 U. S. 902). That was as recently as 1955, while the instant case was before the Commission. Thus the singular situation existed that at about the time the Commission was disavowing interchange jurisdiction here, it was contending in this Court, and successfully, that a challenge of that jurisdiction presented no substantial question. And if it is suggested that the *Seaboard* case turned on adequacy of facilities, the suggestion is in error; the Commission's reports clearly show there were adequate facilities at both of the possible interchange points involved.

2. The Government also relies, as the Commission did, on *Peoria & P. U. Ry. Co. v. United States*, 263 U. S. 528 (1924). There this court set aside an order of the Com-

mission requiring the defendant to switch in interchange cars tendered to it by the complainant. The ground of the decision, though, was that the order was entered without notice or hearing under the emergency powers of Section 1 (15), when the basis for the exercise of those powers did not exist. If the decision has any significance here, it is to be found in the following statement by Justice Brandeis at the outset (263 U. S. 531):

> "*It is conceded* that the Commission could, under its *general* powers and upon appropriate procedure, order a terminal company to perform a service of this character." (Emphasis supplied.)

III. *Appellee T&NO's Motion.*

The motion of T&NO deals almost wholly with the merits of the interchange controversy. The facts on that score disclose an egregious inequity, about which appellants could be voluble were it here in issue. It is not, and we refrain. We cannot but observe, however, that T&NO characterizes as undisputed facts many matters which appellants do dispute, and will further if the opportunity is given. At present but two arguments of that appellee require notice.

T&NO in effect argues (Motion, 9) that under the *Baltimore* decision, particularly the last paragraph thereof, appellants would not make out a case unless they showed that they were not compensated for the services they perform. *Baltimore* did not so hold, and this is not the law even in an avowed divisions case. Divisions are a matter of equity and fairness between carriers, and not of the adequacy *vel non* of compensation. Divisions may be compensatory but inequitable, and hence unlawful; and they may be non-compensatory but fair, and hence *not* unlawful. Cf. *Baltimore & O. R. Co. v. United States*, 298 U. S. 349 (1936),

especially the concurring opinion of Justice Brandeis (383). That the lower court fell into misapprehension and patent error on this point is another matter proper for inquiry on this appeal.[1]

T&NO asserts there is nothing new or novel about the decision of the Commission and the lower court. This claim is germane to this appeal and we need to examine whether it is true. It is not. *Baltimore* was decided in 1928, and since then there has been no case on substantially similar facts before the Commission or the courts. The contrary can be argued, it is true, on the basis of the 1930 predecessor to the instant case. *Houston Belt & Terminal R. Co. v. Texas & New Orleans R. Co.*, 168 I. C. C. 260. But that proceeding is distinguishable for the reason, if no other, that at the time the Commission treated lines like the Belt as intermediate carriers, like the Terminal Railroad in *Baltimore*. Its subsequent repudiation of that view invalidates that decision here.

On the other hand, after the *1930 Houston case*, as well as *Baltimore*, the Commission had before it a complaint on all fours with the present one, and expressed views diametrically opposed to those applied here. *Kansas City S. Ry. Co. v. Louisiana & A. Ry. Co.*, 213 I. C. C. 351 (1935), previously discussed (Jur. St. 12). On the other hand again, in the *Seaboard Air Line* case, discussed above, the Commission adopted a broad view of its interchange powers, and was sustained (by this Court summarily) in so doing. It is true the defense based on *Baltimore* was not there present; but sweeping power to regulate interchange was asserted, in arresting contrast to the timid and chary view of jurisdiction taken here.

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[1] That court said that if appellants are not *adequately reimbursed* for their services, that must be shown so that a new division will be made or the interchange arrangement altered (Jur. St. 28, 153 F. S. 9).

Conclusion.

Substantial and important questions are presented and the motions to affirm should be overruled.

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

MOTION TO AFFIRM

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MOTION TO AFFIRM

MOTION

Texas and New Orleans Railroad Company (hereafter referred to as "T&NO"), one of the appellees in the above entitled case, moves to affirm on the grounds that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

This is a direct appeal from the final judgment entered September 23, 1957, by a three-judge district court dismissing appellants' complaint seeking to set aside an order of the Interstate Commerce Commission. The jurisdictional

statement was served on appellee Texas and New Orleans Railroad Company on January 17, 1958.

QUESTIONS PRESENTED

1. Assuming, as did the court below, that the Commission possesses power to require a change in the interchange arrangement at Houston, Texas, between appellants and T&NO, did the Commission err in refusing to order such a change in view of the following undisputed facts:

a. the present interchange arrangement was proposed by appellants, first in 1911, and more recently in 1950, and is evidenced by written contracts freely entered into in 1912 and 1950;

b. the actual interchange takes place in the immediate vicinity of a principal intersection of the railroads involved, and both appellants and T&NO haul their respective interchange cars to and from that intersection;

c. appellants perform no more work in connection with the interchange than they originally proposed and contracted to perform;

d. the change sought by appellants would neither improve service to the public nor affect the rates paid by the public; and

e. having enjoyed the benefits of the present arrangement for nearly 46 years, appellants now seek a change therein which would require T&NO to deliver interchange cars to appellants at points 8 and 2.5 miles from a principal intersection of the lines of T&NO and appellants, while appellants would continue delivering interchange cars to T&NO at said principal intersection?

2. Where each line of railroad delivers interchange cars to the other at a principal intersection of their lines

of railroad at Houston, Texas, does such arrangement become unjust and unreasonable solely because one railroad, at substantial initial and continuing expense, moves its train yard to a point immediately adjacent to said intersection, while the other railroad, for its own convenience, maintains its train yards 8 and 2.5 miles from said intersection?

3. Were not both the Commission and the court below correct in holding that this case is controlled by *A. & O. R. Co. v. U. S.*, 277 U. S. 291 (1928), in view of the following undisputed facts:

a. in prescribing a division of joint rates between railroads, *Section 15 (6), 41 Stat. 486*, requires that the Commission consider, among other things, "the amount of revenue required to pay their respective operating expenses, taxes and a fair return on their railroad property held for and used in the service of transportation";

b. appellants made no effort to present any evidence of the kind contemplated by Section 15 (6);

c. in negotiating divisions with T&NO, appellants at least took into account their overall expenses of operation and they had available to them information as to the actual cost of effecting interchange at Houston, Texas, with T&NO;

d. appellants here seek to be relieved of substantial expense in effecting such interchange with T&NO, and to shift that expense to T&NO either by requiring T&NO to perform part of the service now performed by appellants, or to pay appellants for performing that service; and

e. there is a strong presumption that divisions existing between appellants and T&NO are fair and reasonable, and there was no proof that shifting a part of the expense of interchange at Houston, Texas, from appellants to T&NO would not render unfair and unreason-

able existing divisions of joint rates involved in such interchange?

STATEMENT OF THE CASE

Prior to the establishment in 1912 of T&NO's Englewood Yard as the place of interchange at Houston, appellants and T&NO interchanged cars at a number of points, each in a congested part of the city. Each interchange point was at or in the immediate vicinity of an intersection of the lines of railroad involved (R. 381-384, Exhibits 8 and 9). In 1911 appellants desired to move the various interchanges with T&NO from the congested parts of Houston to Englewood Yard, which T&NO did not then use as a train yard. Although reluctant at first, T&NO finally agreed and the contract of May 20, 1912 was made (R. 385-391, Exhibit 14). This contract fixed Englewood as the point of interchange, which is and was immediately adjacent to a principal point of intersection of the lines of railroad of appellants and T&NO.

In 1913 T&NO started converting Englewood into a consolidated train yard and this was completed in February of 1915 (R. 394-397). This conversion was accomplished at an initial cost of over $600,000. Recently Englewood was changed into a modern gravity type yard at a further cost of $6,000,000 (R. 402-404). By using Englewood as a consolidated train yard, T&NO also increased substantially its operating cost through payment of (1) additional mileage to certain freight crews and (2) arbitrary payments which the Company is required to make to road crews for handling their engines and cabooses between Englewood and Hardy Street, the latter being the terminal for all road crews in freight service. In 1929 T&NO's additional operating expense amounted to $90,000 per year. In September, 1954,

the payment of the aforesaid arbitraries alone amounted to $10,634.15, or $127,603.80 a year (R. 404-405).

After appellants knew that Englewood would be T&NO's consolidated train yard; three other interchanges between appellants and T&NO were moved to that point by agreement. These were:

1. HE&WT — H&TC interchange with Houston Belt & Terminal Railway Company (hereinafter referred to as "HB&T" or "Belt"), November 16, *1914* (R. 394-397);

2. SA&AP — HB&T interchange, *1925* (R. 397-398); and

3. IGN — T&NO interchange, *1950* (Exhibits 25-28).

Although appellants had proposed the interchange arrangement at Englewood and were performing no more service in that regard than they had agreed to perform, solely because T&NO converted Englewood into a consolidated train yard appellants sought a change in the arrangement. In 1929 appellants filed a complaint with the Commission seeking to disregard the 1912 contract and to require T&NO to deliver to New South Yard, 8 miles from Englewood, cars it was interchanging with appellants. After hearing, the Commission dismissed the complaint. *Houston Belt & Terminal Ry. Co.* v. *Texas and N. O. R. Co.*, 168 I.C.C. 230 (hereafter referred to as *the 1930 case*).

For 23 years thereafter the interchange was effected at Englewood without difficulty or complaint (R. 410). In fact during this period appellants proposed and negotiated an agreement extending and supplementing the 1912 contract. This agreement, entered into in 1950, and evidenced by Exhibits 25-28, provides in part as follows:

"1. All cars interchanged between the T&NO on the one hand and the HB&T and its Using Lines on the other

hand, *be physically interchanged at the T&NO Englewood Yard.*

2. *The HB&T will deliver and receive all such cars in that yard.*

* * * * *

6. *Except as modified* * * * *the existing interchange agreement between T&NO and HB&T dated the 20th day of May, 1912, shall remain in full force and effect.*" (Italics supplied.) (Exhibits 26-27.)

The Commission dismissed the *1930 case* and likewise dismissed the present complaint, at least in part because in neither proceeding did the record contain any evidence that would indicate that the revenue received by the appellants from the division of joint rates is unreasonable or insufficient to cover the cost of interchange by HB&T at Houston with T&NO. The evidence did show, however, that each of the appellants had readily available at all times statements showing the actual cost to it of effecting interchange at Houston with T&NO. HB&T performs this interchange and each month gives to each appellant a statement showing the cost to it per car of the services rendered for it by HB&T in each section of the Houston terminal (R. 58, 110, 192, 721-723). If in effecting interchange between appellants and T&NO, HB&T had charged appellants a published tariff rate for this service, appellants admit (see page 10 of their complaint before the Commission) that they would have taken such rate into accounting in making divisions if they were required to absorb the same. Since appellants absorbed HB&T's charge for effecting interchange with T&NO, and this charge was well known, no reason was shown why it was not likewise considered, if in fact it was not, in agreeing on divisions with T&NO. The fact that one absorbed charge is published in a tariff and

the other is not makes no difference so far as appellants' operating expenses are concerned. In fact, the evidence indicated that these charges were taken into account in agreeing upon divisions, at least to the extent that they entered into the picture of overall expenses incurred by each appellant (R. 333, 339-340, 374-375, 379).

It was undisputed that in negotiating divisions T&NO takes into account specific terminal cost involved in effecting interchange if that cost is known; otherwise, overall transportation costs, including terminal expenses, are used (R. 625, 628-630, 632-635, 643, 647).

It was also undisputed that if the expense of effecting interchange is known, it is not necessary for the person negotiating divisions to know either the point at which interchange is made or the manner of effecting same (R. 339-340, 379, 628-630).

In the complaint filed with the Commission, appellants requested that T&NO either be required to deliver interchange cars to HB&T at New South and Settegast Yards, 8 and 2.5 miles respectively from Englewood, or pay HB&T for transporting the interchange cars received from T&NO at Englewood to said yards (Appellants' Jurisdictional Statement, 27).

ARGUMENT

Appellants have included a number of questions in their Jurisdictional Statement which are wholly unnecessary to a decision of this case. Examples are;

1. Whether the Commission has the power to require a change in the interchange arrangement; and

2. Do the 1912 and 1950 contracts prevent an exercise of this power if it otherwise exists?

Neither of these questions controlled the decision of either the Commission or the Court, and neither is of more than

academic interest here. The Commission's decision is based primarily upon the following:

> 1. Failure of appellants (as required by the *B. & O.* case) to present any evidence showing that existing divisions of joint rates covering service involving the Houston interchange are unreasonable; and
>
> 2. Even if it were the practice for other carriers throughout the country to make delivery on the rails of their connections, either direct or by bearing the charges, such a practice, *without evidence,* does not prove that it is unjust and unreasonable for T&NO and appellants to agree that appellants will handle interchange cars to and from the point of intersection where the interchange is effected.

The Commission properly held that the location of T&NO's train yard near the point of intersection is neither important nor controlling. Each railroad is free to locate its train yard or yards to suit its operating convenience. A change in the location of T&NO's train yard which did not affect in any way the quantum of service rendered by appellants in effecting interchange could not and did not render the interchange arrangement unreasonable. In considering the effect of the relocation of T&NO's train yard, appellants wholly ignored the very substantial initial and continuing expense incurred by T&NO in establishing and maintaining its train yard at Englewood. This expense more than offsets the cost complained of by appellants in moving interchange cars both to and from Englewood.

The Court assumed that the Commission had the power to order a change in the interchange arrangement, and held that under the *B. & O.* case, appellants had simply failed to make out a case which would warrant an exercise of that power. As the Court below said:

"* * * it is not really the *manner* of interchange, but the *expense* of delivering these cars which is being complained of. * * *

"* * * The cost of the movement by Belt, of course, is known. Some evidence indicated that it was as much as $100,000 each year. If this is now adequately reimbursed by divisions, neither the arrangement nor the 1912 contract, nor the resulting expense is unfair. If it is not, then this must be shown either so a new division will be made or the interchange arrangement altered."

The foregoing conclusions are unanswerable. Appellants' only attempted answer is that they are not seeking a direct change in divisions.[1] They ignore the facts that the the fairness of the present interchange arrangement necessarily involves *financial considerations*, and cannot be determined upon a mere difference in distance or service. There is no showing in this case that such differences were not compensated for in the division of rates and were not considered in fixing or dividing two of the three applicable switching charges.

Likewise appellants ignore the real reason why the order of the Commission in the *B. & O.* case was held to be without support in the record. The last paragraph of the court's opinion in the *B. & O.* case points out that it is impossible for the Commission to determine the merits of a complaint alleging that the expense of performing a particular service is unjust and unreasonable to a certain set of carriers, *unless it is likewise made to appear that such carriers are not compensated for performing the service.* The mere fact that one carrier in effecting interchange performs more of

[1] As recognized by the trial court, an exact parallel is again the *B. and O.* case, where the Supreme Court noted that changes in divisions had been neither expressly sought by the parties nor ordered by the Commission.